

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

WAYNE D. STURM,	)	
	)	
Claimant,	)	<b>IC 04-512281</b>
	)	
v.	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
RI-CO INDUSTRIAL, INC.,	)	<b>AND RECOMMENDATION</b>
	)	
Employer,	)	Filed
	)	October 22, 2004
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted an emergency hearing in Bonners Ferry on August 24, 2004. Claimant was present in person *pro se*; Defendants were represented by Paul J. Augustine. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs. Pursuant to an agreement made at hearing, Defendants were to submit their brief first and Claimant then had two weeks in which to respond. He chose not to do so. This matter subsequently came under advisement on October 7, 2004, at the close of the briefing period.

## **ISSUES**

The noticed issues to be resolved are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment;
2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment; and,
3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof.

## **ARGUMENTS OF THE PARTIES**

Claimant asserts he injured his low back on May 26, 2004, while lifting and pulling a welder on a cart off of a pallet onto a second floor platform. He seeks the cost of the medical care incurred to date and the surgical procedure recommended by Dr. Ganz.

Defendants argue Claimant's assertion he injured his back moving the cart and welder is not credible, and refuted by the credible and consistent eyewitness testimony of his two co-workers, Mr. Holmes and Mr. Delton, who were with him when the alleged industrial accident occurred. They maintain Claimant did not notify Employer of the alleged accident until well after he was terminated for drinking on the job. Defendants ask the Commission to deny Claimant's claim for compensation.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and his spouse, Patricia Ann Maher, and that of Employer, Delton V. Isaac, and his witnesses Justin L. Holmes and Bryan Delton taken at the August 24, 2004,

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

hearing;

2. Claimant's Exhibit 1 admitted at the hearing; and,

3. Defendants' Exhibits A through E admitted at the hearing. Exhibit C is the deposition of Claimant taken by Defendants on August 13, 2004.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant began working for Employer at its Bonners Ferry machine shop as a machinist on November 25, 2003. He manufactured precision parts from metal and nonporous plastic stock. The work was initially part-time; he was paid \$10.00 per hour. By March 2004 Claimant was working full-time. He lived in Troy, Montana, with his spouse.

2. Claimant reported for work at 10:00 a.m. on May 26, 2004. Normal start time was 8:00 a.m., but Claimant had called in stating he had personal business to take care of. After he arrived, Claimant and Employer's shop manager, Justin Holmes, began clearing out a work space for the installation of new equipment Employer was acquiring; the area had previously been used for welding. As part of the clean-up, an older welder on a cart was being moved from the main floor to a second level mezzanine over part of the shop. The cart weighed approximately 100 pounds, the welder between 600 and 800 pounds.

3. Claimant and Mr. Holmes manually positioned the cart and welder under a chain hoist. The hoist was used to raise the welder, the cart was moved aside, a wooden pallet was placed under the welder, the cart was placed on the pallet, and the welder lowered back down on the cart. The cart and welder were tied to the pallet with mechanic's wire. Scrap sheet metal had been placed

on the pallet to keep the cart's wheels from falling into the spaces between the pallet slats. Using the forklift, Mr. Holmes raised the pallet containing the cart and welder to the second floor platform.

4. The limits on the forklift, however, prevented the pallet from being raised high enough to roll off the cart, so the load was lowered and a second pallet was added under the first. Mr. Holmes was then able to raise the level of the top pallet to the level of the second floor so that the cart could be rolled off.

5. Mr. Holmes went and got Bryan Delton, a fabricator, from his welding task to help him and Claimant move the cart off the pallet. Mr. Holmes was on the pallet pushing the cart while Claimant and Mr. Delton were pulling the cart from the second level platform. The three men were Employer's only employees.

6. Claimant stated the raised pallet was approximately one inch below the level of the platform, and that in pulling and lifting the cart up to the level of the platform, he felt a sudden sharp pain and a slight pop in his back. He further stated he made a slight sound when he felt the pain.

7. Mr. Holmes stated the pallet was level with the platform, and that he and Mr. Delton did the majority of the work in pushing and pulling the cart off the pallet because the end of the cart they were moving had swivel casters while the end Claimant was on had fixed casters.

8. Mr. Delton also stated the pallet was level with the platform, and that no lifting was required. He further stated he did not observe Claimant having any difficulty in helping push the cart and welder off the pallet.

9. The three men moved the cart off the pallet onto the platform. Mr. Holmes went downstairs to take a telephone call and Mr. Delton went to speak to a customer. According to Mr. Holmes and Mr. Delton, the two returned, and together the three moved the cart to a spot where Mr.

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Holmes wanted it placed. Claimant stated he finished moving the cart and welder by himself after the other two left.

10. Again using the forklift, eight 25 pound bags of glass beads were lifted onto the platform and placed by the cart; all three men helped move the bags. After the bags were placed by the cart, all three went downstairs. Claimant returned to cleaning-up and sweeping the floor in the area in which the new equipment was to be installed, Mr. Holmes went to the office, and Mr. Delton returned to his welding task.

11. Claimant stated he went to the office at noon to punch out for lunch, and that he told Mr. Holmes "I think I screwed up my back." Deposition p. 74; Transcript, p. 21. He acknowledged giving no further explanation. Claimant further stated he remained on the premises to eat his lunch. Ms. Maher stated she packed Claimant's lunch that day.

12. Both Mr. Holmes and Mr. Delton stated Claimant borrowed Mr. Delton's truck to go to lunch. Mr. Holmes stated he admonished Mr. Delton for loaning his truck to Claimant since he did not have a driver's license.

13. During his deposition, Claimant stated he told Employer during a meeting at approximately 12:30 p.m. that he had hurt his back; he maintained Employer had asked him to sign some paperwork involving a job training program. At hearing, Claimant stated he told Employer in general terms that his back was sore when he met with him to sign the paperwork, but that he did not get into any specifics.

14. Mr. Delton stated when Claimant returned from lunch, he observed him reach behind the driver's seat, pull out a bottle of whiskey, put it in a container, and walk into the shop. Later, from the tool room, he observed Claimant take the bottle out of his lunch box, take a drink, and

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return the bottle to his lunch box.

15. Mr. Holmes returned from lunch at approximately 1:30 p.m. Mr. Delton approached him and told him he had seen Claimant drinking in the machine shop. Mr. Holmes informed Employer. Employer spoke to both Mr. Holmes and Mr. Delton about the situation; Mr. Holmes recommended Claimant be terminated.

16. Employer approached Claimant, saw a half-empty pint of Black Velvet in his lunch box, told him that he could not drink on the job, and told him that his job was over.

17. Claimant did not argue or protest when Employer told him that he was terminated. He went to the office and left a telephone message for his spouse to come and pick him up. Claimant stated that while he was in the office, he told Mr. Holmes "My back is really killing me." Deposition, p. 82.

18. Mr. Holmes denied Claimant told him that he hurt his back in the office. He also denied hearing Claimant make any utterances or noises while moving the cart and welder onto the second level platform. Mr. Holmes further stated he had suspected Claimant had drank on the job in the past, and that a customer had previously approached him about Claimant smelling of alcohol.

19. Claimant denied drinking on the job. He did, however, acknowledge being up drinking with his spouse until 3:00 or 4:00 a.m. that morning.

20. After calling his spouse, Claimant packed his hand tools in a five-gallon bucket and carried the bucket outside to wait for her to pick him up. He estimated the bucket of tools weighed 40 to 45 pounds.

21. Mr. Holmes stated Claimant's tool bucket weighed between 50 and 75 pounds, that Claimant carried it, along with his lunch box, outside to a picnic table where he waited for his

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spouse to pick him up. He further stated Claimant had no difficulty carrying the bucket, and that he was not limping. Mr. Holmes also stated Claimant took “a few pops” while he was waiting for his spouse, and that after she arrived at approximately 4:00 p.m., Claimant loaded the tool bucket into his spouse’s vehicle. Transcript. P. 75.

22. Mr. Delton stated Claimant did not have any difficulty carrying his bucket of tools out of the shop, and that Claimant never told him that he injured himself.

23. At hearing, Claimant stated he asked Employer at approximately 3:00 or 3:30 p.m. that afternoon about his employment, and that he also told him he thought that he had “screwed up” his back. (Transcript, p. 41.) Employer denied the conversation took place, and indicated he had left the facility for home approximately one-half hour after he discharged Claimant.

24. Claimant’s spouse stated Claimant was unable to pick up the bucket when she arrived to pick him up, and that she helped lift the tool bucket into her vehicle. She further stated Claimant told her that he had hurt his back, and that he had pain radiating down into his left hip. Claimant’s spouse also stated he was unable to start the lawnmower or help her wash dishes that evening.

25. Claimant contacted the Industrial Commission Rehabilitation Division in Sandpoint on June 4, 2004, asking how to file a workers’ compensation claim. He was told to contact his Employer. Claimant also indicated he did not know if he could continue to work.

26. Claimant, and later his spouse, both called Employer the evening of June 6, 2004, asking for his job back. Employer told both no. Claimant asserted he told Employer he had been injured and asked for claim forms. Employer denied anything was said about any industrial injury.

27. A Form 1 signed by Claimant was filed with the Commission on June 7, 2004, by a northern Idaho attorney. Claimant later decided not to retain the attorney. The Form 1 indicated

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7**

Claimant had injured his back and hip on May 26, 2004, while lifting and pulling a one-half ton welder and cart off a pallet. John R. Wilcox, M.D., was listed as Claimant's treating physician.

28. Claimant called Mr. Holmes on June 8, 2004, asking if his last paycheck was ready. The eighth was Employer's normal payday. Mr. Holmes told Claimant the checks had not been brought in yet. Claimant then told him that he thought he injured himself moving the welder and that he should get some workers' compensation paperwork ready. Mr. Holmes told Claimant to contact Employer directly for information on the procedures to follow in filing his claim for compensation. Claimant picked up his last paycheck later that day.

29. Claimant also saw Dr. Wilcox in Troy on June 8, 2004. This was the first time Claimant had seen him. Dr. Wilcox's chart notes indicate Claimant was one of three men moving an 800 pound welding machine with a cart off a pallet which had been set on a higher floor. The notes further indicate, that after lifting and moving the welder, Claimant walked away and felt a burning in his mid-spine and low back area, and then left gluteal pain. Dr. Wilcox diagnosed a left L5 impingement with signs and symptoms on the left, and left S1 root symptoms with soft signs of root irritation. He also noted Claimant had no pain behavior at all, and that when actual compression was performed, there was no wincing or complaint, but when asked, Claimant said there was a slight discomfort in the low back. Dr. Wilcox ruled out a herniated nucleus pulposus at L4-5 or L5-S1. It was noted Claimant preferred to see a neurosurgeon in Coeur d'Alene; his first choice was William F. Ganz, M.D.

30. Claimant returned to Employer's facility on June 9, 2004, to pick up the remainder of his tools. Mr. Holmes and Mr. Delton loaded the majority for him. Mr. Holmes noticed Claimant was limping when he initially came in, but that later, when he was carrying out the remainder of his



tools, he was not. Mr. Holmes further indicated Claimant was carrying the tools like one would carry a load of firewood; he indicated he had placed the tools in Claimant's arms in an attempt to see how much Claimant could carry.

31. Claimant returned to Dr. Wilcox on June 22, 2004, complaining of continued back pain down into his left thigh with numbness and tingling down to his foot. Dr. Wilcox noted Claimant was "feeling a bit better," and that his diagnosis was "a bit unsure." Exhibit 1. He diagnosed Claimant had a L5 nerve root irritation with perhaps a L4 irritation. Dr. Wilcox ruled out a lateral femoral cutaneous nerve injury or irritation, and a L5 nerve root compression.

32. Claimant saw Dr. Ganz on July 9, 2004, on Dr. Wilcox's referral. Earlier that day, x-rays of the lumbosacral spine were taken and a MRI of the lumbar spine was conducted. The x-rays showed extensive degenerative arthritis throughout the lower thoracic and lumbar spine with disk narrowing at multiple levels which was interpreted as severe spondylosis of the lumbosacral spine.

33. The MRI showed disks that were generally degenerative and/or desiccated with disk space height narrowing throughout. There were moderate diffuse circumferential disk bulges at T10-11, T11-12, T12-L1, L1-2, and L2-L3. In addition, there were epidural lipomatosis at L1-2 and L2-3 resulting in central spinal stenosis. There was a moderate, diffuse, circular disk bulge at L3-4, prominent posterior element degenerative changes, and epidural lipomatosis, which, with the spondylotic changes, resulted in central spinal stenosis. There was a moderate, diffuse, circumferential disk bulge at L4-5 with severe posterior element degenerative changes, neural foraminal stenosis on the left with the complete loss of epidural fat, and epidural lipomatosis, which, with the spondylotic changes, resulted in central spinal stenosis. There was a moderate, diffuse, circumferential disk bulge at L5-S1 along with severe posterior element degenerative changes.

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There was also bilateral neural foraminal stenosis with the complete loss of epidural fat.

34. Claimant told Dr. Ganz he was helping pick up and pull an 800 pound welder on May 26, 2004, when he experienced immediate pain in his low back and left hip. Dr. Ganz diagnosed left L4 and L5 radiculopathy and recommended a left L4-5 hemilaminotomy, medial facetectomy, and microdiscectomy to decompress the left L4 and L5 nerve roots. He did not correlate the need for the procedures to the alleged May 26th industrial accident, but did indicate Surety would have to approve the surgery.

35. Surety denied Claimant's claim for compensation on July 19, 2004.

36. Claimant returned to Dr. Ganz on August 20, 2004, complaining of worsening symptoms. Dr. Ganz reviewed Claimant's MRI, indicated it showed a broad-based osteophytic spur at L4-5 bulging into the left L4-5 foramen with probable compression of the exiting left L4 and traversing left L5 nerve root. He again recommended surgery to decompress the left L4 and L5 nerve roots. Dr. Ganz then opined, that although Claimant had old degenerative changes to his lumbosacral spine, they were not significantly symptomatic before his work-related injury which activated his current symptoms.

37. Claimant is not a credible witness.

## **DISCUSSION**

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Injury/Accident (Causation).** The Idaho Workers' Compensation Law defines

injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor’s opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

The crux of this matter is whether Claimant’s low back condition was caused by an industrial accident. If it was, he is entitled to the medical care either provided by or recommended by his treating physicians.

Claimant asserts he injured his low back on the morning of May 26, 2004, while lifting and pulling a cart carrying a welder off a pallet onto a second floor platform. He further asserts the

pallet was one inch below the level of the platform, necessitating the lifting maneuver which caused the sudden sharp pain. Both Mr. Holmes and Mr. Delton maintain the pallet and platform were level, and that no lifting was required in moving the cart off the pallet. The three men were the only ones present when the alleged accident occurred. The Referee notes both Claimant and Mr. Holmes stated a second pallet had to be placed under the first to raise the cart high enough to bring the top of the pallet up to the approximate level of the platform. If the two pallets were insufficient, a third could have been added.

Claimant asserts he made a sound when he hurt his back. Mr. Holmes and Mr. Delton both denied hearing any sound from Claimant while the three men were moving the cart and welder off the pallet and onto the platform. The Referee notes Claimant continued to help move the cart into position, even after he said he hurt himself.

Claimant asserts he told Mr. Holmes that he hurt his back while clocking out for lunch. Mr. Holmes denied Claimant did so. Claimant also asserts he returned to the office during the lunch hour and told Employer that he hurt his back. His descriptions of that conversation, however, varied from his deposition testimony to his hearing testimony, and both Mr. Holmes and Mr. Delton stated Claimant borrowed Mr. Delton's vehicle to go to lunch. This calls into question Claimant's assertions that he remained at the facility to eat his lunch, and that he spoke with Employer during the lunch hour about his back.

Claimant asserts he told Mr. Holmes that he hurt his back when he went to the office to call his spouse after being terminated. Mr. Holmes denied the conversation took place. Claimant also asserts that he told Employer he hurt his back while waiting for his spouse to pick him up. Employer denied this conversation occurred, stating he had already left the facility for home by the

time Claimant said the conversation took place. Moreover, Claimant was observed carrying a five-gallon bucket of tools, without any apparent difficulty, out of the facility after he was discharged. He also denied drinking on the job; three witnesses testified otherwise. The Referee finds Claimant is not a credible witness.

Claimant's assertion the pallet was one inch below the platform raises a question as to how the three men were able to lift the cart and welder, together weighing approximately 700 to 900 pounds. It would seem likely that Mr. Holmes and Mr. Delton would have remembered lifting this much weight; instead they both stated the pallet was level with the platform, and that they simply rolled the cart off the pallet onto the platform. Without this lifting, Claimant's stated cause of his back injury, and the one relied on by Dr. Ganz for his causation opinion, does not exist. The Referee finds Claimant has not demonstrated that an accident occurred on the morning of May 26, 2004. The weight of the evidence is against him. In addition, the Referee notes Claimant never specifically told Employer or either of his co-workers that he injured his back while lifting the cart and welder off the pallet. Thus, the Referee concludes Claimant's low back condition is not the result of an accident arising out of and in the course of his employment.

2. **Medical Benefits.** While Claimant has received care for his low back condition, and his treating physician has opined several surgical procedures are required to further treat his condition, Claimant has failed to demonstrate that his condition is the consequence of an industrial accident. Thus, the Referee concludes Claimant is not entitled to medical care for his low back condition.

### **CONCLUSIONS OF LAW**

1. Claimant's low back condition is not the result of an accident arising out of and in the

course of his employment.

2. Claimant is not entitled to medical care for his low back condition.

### **RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 18th day of October, 2004.

INDUSTRIAL COMMISSION

/s/  
Robert D. Barclay  
Chief Referee

ATTEST:

/s/  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of October, 2004, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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/s/ \_\_\_\_\_